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No. 98-1856

IN THE
Supreme Court of the United States

LEILA JEANNE HILL, *et al.*,

Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, *et al.*,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF *AMICUS CURIAE* OF PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS IN SUPPORT OF PETITIONERS LEILA JEANNE HILL, ET AL.

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38 pp

QUESTIONS PRESENTED

Colorado law makes it a crime to approach within eight feet of any other person, on a public sidewalk, without that person's consent, for the purpose of engaging in expressive activity toward that person – specifically, passing leaflets, showing signs, or orally educating, counseling, or protesting–if that person happens to be within 100 feet of the entrance to a health-care facility. See Colo. Rev. Stat. § 18-9-122(3). The consent requirement applies even if the person approached is not seeking to enter the facility. See *id.* The general question here is whether this Colorado criminal statute "abridges the freedom of speech, or of the press" guaranteed by the First and Fourteenth Amendments of the United States Constitution. Specifically, this case presents the following questions:

1. Is § 18-9-122(3)'s consent requirement, which vests in citizens absolute unfettered discretion, enforceable by law, to restrict speech by refusing to consent, an unconstitutional prior restraint on speech?

2. Is § 18-9-122(3), which gives legally enforceable consent to stifle speech to anybody who happens to be within 100 feet of a health-care facility entrance and which imposes the consent restriction no matter how deferential or nonthreatening the speaker, narrowly tailored to advance the statute's ostensible purpose of protecting access to health care facilities?

3. Is § 18-9-122(3), which requires speakers to calculate eight feet and to guess, among other things, whether moving one's arm toward a person to pass a leaflet constitutes "approach[ing]," unconstitutionally vague?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. COLORADO REVISED STATUTE § 18-9-122(3) IS TARGETED AT SPEECH AND EXPRESSIVE ACTIVITY IN PUBLIC FORA 5

II. SECTION 18-9-122(3) OPERATES AS A PRIOR RESTRAINT ON SPEECH THAT GIVES CITIZEN CENSORS THE UNBRIDLED DISCRETION TO RESTRICT SPEECH ON PUBLIC SIDEWALKS 7

A. Section 18-9-122(3) Vests Unbridled Discretion in Citizen Censors. 9

B. Section 18-9-122(3) Imposes no Time Limit for Consenting 11

C. Section 18-9-122(3) Lacks any Other Procedural Safeguards 12

III. SECTION 18-9-122(3) IS NOT NARROWLY TAILORED BECAUSE IT TARGETS AND ELIMINATES MUCH MORE THAN CONDUCT THAT IMPEDES ACCESS TO COLORADO HEALTH FACILITIES 12

A. Section 18-9-122(3) Effectively Eliminates, Within 100 Feet of Colorado Health Care Facilities, All Leafleting, A First Amendment Activity Which In No Way Threatens Any Significant Government Interest 14

B. Section 18-9-122(3) Suppresses Constitutionally Protected Speech That Poses No Threat to the Government's Interest in Assuring Free Access to Colorado Health Care Facilities 17

IV. SECTION 18-9-122(3) IS UNCONSTITUTIONALLY VAGUE 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: Page(s)

Baggett v. Bullitt, 377 U.S. 360 (1964) 26

Connally v. General Constr. Co., 269 U.S. 385 (1926) 26

Evans v. Newton, 382 U.S. 296 (1966) 4, 8

Freedman v. Maryland, 380 U.S. 51 (1965) 12

Frisby v. Schultz, 487 U.S. 474 (1988) 13

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 9, 10, 11

Grayned v. City of Rockford, 408 U.S. 104 (1972) 26, 27, 29

Hague v. CIO, 307 U.S. 496 (1939) 7

Hill v. Thomas, 973 P.2d 1246 (Colo. 1999) 3, 6, 23, 24, 25

Houston v. Hill, 482 U.S. 451 (1987) 18, 19

Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) 26

International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) 15, 17

Kolender v. Lawson, 461 U.S. 352 (1983) 26

Kovacs v. Cooper, 336 U.S. 77 (1948) 16, 20

Lovell v. City of Griffin, 303 U.S. 444 (1938) 6, 14

Madsen v. Women's Health Ctr., Inc.,
512 U.S. 753 (1994) 18, 23, 24

Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 7

Northeast Women's Ctr. v. McGonagle,
868 F.2d 1342, 1348 (1989) 3

Papachristou v. Jacksonville, 405 U.S. 156 (1972) 27

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 3

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) 4, 8, 11

Riley v. National Fed'n of the Blind, Inc.,
487 U.S. 781 (1988) 11, 26

Sabelko v. City of Phoenix, 120 F.3d 161
(9th Cir. 1997) 19, 20

Schenck v. Pro-Choice Network, Inc.,
519 U.S. 357 (1997) 6, 7, 13, 15, 16, 23, 27

Schneider v. New Jersey, 308 U.S. 147 (1939) 14, 15

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 10

Smith v. California, 361 U.S. 147 (1959) 30

Smith v. Goguen, 415 U.S. 566 (1974) 27

Southeastern Promotions, Ltd. v. Conrad,
420 U.S. 546, 559 (1975) 9

Terminiello v. Chicago, 337 U.S. 1 (1949) 4

Thornhill v. Alabama, 310 U.S. 88 (1940) 25

United States v. Grace, 461 U.S. 171 (1983) 6, 25

United States v. Kokinda, 497 U.S. 720 (1990) 17

Village of Hoffman Estates v. Flipside,
455 U.S. 489 (1982) 26

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 13

Statutes:

Colo. Rev. Stat. § 18-9-122(1) (1993) 4, 10

Colo. Rev. Stat. § 18-9-122(3) (1993) ..... *passim.*

Colo. Rev. Stat. § 18-9-122(4) (1993) 2

Constitutional Provisions:

U.S. Const. Amdt. I 3

U.S. Const. Amdt. XIV 3

Other Materials:

American Heritage Dictionary 312
(2d College ed. 1991) 28

INTEREST OF AMICUS*

People for the Ethical Treatment of Animals, Inc. ("PETA" or *"Amicus"),* is a nonprofit organization dedicated to establishing and protecting the rights of all animals. Its basic tenet is that animals are not ours to eat, wear, experiment on, or use for entertainment. PETA educates policy-makers and the public about animal abuse and promotes an understanding of the right of all animals to be treated with respect.

PETA pursues its goals in part by bringing to public attention practices that it finds objectionable and that, it believes, the public would find similarly objectionable if the public were fully aware of them. One of the principal means of making the public aware of such practices is by communicating with the public. Such communication is achieved by speech in its various forms, be it leafleting, showing signs, or objecting orally. More typically, and most effectively, such communication is achieved simply by talking to people, quietly and at length, about the moral or ethical issue raised by the practice in question.

The locus of PETA's efforts to communicate is often where the practices to which it objects are conducted. One of those practices, experimentation on animals in the name of medical science, frequently is conducted inside health care facilities as

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*Counsel of Record for the parties in this case have consented to filing this brief. This brief was authored in part by John Tuskey, Laura B. Hernandez, and Shannon Demos Woodruff, attorneys for the American Center for Law and Justice (ACLJ). Other attorneys employed by the ACLJ represent petitioners in this case. Amicus PETA represents that no monetary contribution to the preparation of this brief was received from any person or entity other than amicus curiae.

defined in Colo. Rev. Stat. § 18-9-122(4). The criminal prohibition against expressive activity within 100 feet of health-care facilities if such activity is conducted on a public sidewalk within eight feet of another person effectively prohibits the most effective, the only truly lasting way, of communicating -- the face-to-face, person-to-person, mutual exploration of an often complex and subtle moral and ethical issue.

The Colorado law thus substantially curtails PETA's ability to exercise its right of speech as to one of the four principal areas of its concern.

PETA emphasizes that it takes no view whatever on the issue of abortion. Some members and supporters of PETA support broad freedom of choice for women who seek abortion, and some do not. The interests of PETA in this case relate solely to the potential adverse impact on PETA of the Colorado law.

SUMMARY OF ARGUMENT

Colorado Revised Statute § 18-9-122(3) makes it a crime for any person located on a public sidewalk within 100 feet of a "health-care facility"[1] to "knowingly approach" any other person without that person's consent "for the purpose of passing a leaflet, or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling" with that other person. In other words, Colorado has made it a crime to approach a person

[1] "'[H]ealth care facility' means any entity that is licensed, certified, or otherwise permitted by law to administer medical treatment" in Colorado. Colo. Rev. Stat. § 18-9-122(4) (1993).

without his consent to engage in quintessential speech – for example, to give information about animal testing or to hand a person a leaflet advocating or opposing a proposed referendum issue – in a traditional public forum.

The Colorado courts found no constitutional infirmity in § 18-9-122(3) despite the First and Fourteenth Amendments of the United States Constitution, which prohibit states from "mak[ing] [any] law abridging the freedom of speech or of the press." One would think that the ability to at least attempt to communicate with a person reasonably in a traditional public forum falls within the freedom of speech. But the Colorado Supreme Court rationalized Colorado's extraordinary speech restriction by finding that the right to free speech is merely one right to be balanced against other rights. In essence, the Colorado Supreme Court decided that § 18-9-122(3) survives constitutional scrutiny because, on balance, it is more important to allow persons to walk into health-care facilities unbothered by speakers they care not to deal with than it is for persons near health-care facilities to be able to approach others to communicate in a public forum. *See Hill v. Thomas*, 973 P.2d 1246, 1259 (Colo. 1999).

In its opinion, the court noted that "the same constitution that protects the . . . right to free speech . . . also protects the . . . right to abortion services. . . ." *Id.* at 1253 (quoting *Northeast Women's Ctr. v. McGonagle*, 868 F.2d 1342, 1348 (1989)). The court seems to have extrapolated from the right to abortion a more general right to privacy that protects the right to receive other medical services. But even granting the right to abortion, and assuming the more general right to health care, the court transmogrified the right to receive health care *free of undue government interference*, *see Planned Parenthood v.*

Casey, 505 U.S. 833, 846 (1992), into a right to receive such care without being bothered by unwanted speech from private citizens pointing out the consequences of that care – or for that matter on any other subject – on sidewalks near health-care facilities.

Upholding § 18-9-122(3) flies in the face of this Court's free speech jurisprudence. By making the right to approach another person on a public sidewalk to speak depend on that person's consent, § 18-9-122(3) effectively deputizes citizens to censor unwanted speech and thus operates as a prior restraint on speech. And by providing no safeguards to ensure that the citizen-censor does not withhold consent based on the anticipated content or viewpoint of the speech, § 18-9-122(3) encodes into Colorado law the properly-repudiated heckler's veto (or, more precisely here, heckler's license). *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997) (citation omitted); *see generally Terminiello v. Chicago*, 337 U.S. 1 (1949); *Evans v. Newton*, 382 U.S. 296 (1966).

Moreover, even if the consent provision does not operate as a prior restraint, § 18-9-122(3) restricts far more speech than is necessary to protect Colorado's asserted interest in protecting "access to health care facilities." *See* Colo. Rev. Stat. § 18-9-122(1) (1998). Far from being the narrowly tailored time, place, and manner restriction the Colorado Supreme Court found it to be, § 18-9-122(3) is a blunderbuss restriction of quintessential speech in a public forum – including speech that in no way threatens access to health care. Section 18-9-122(1) is not aimed at threats or harassment; rather, the statute operates no matter how calm, quiet, respectful, and non-threatening a speaker may be. Also, § 18-9-122(3) empowers anyone who happens to be within 100 feet of a health-care facility entrance

– not just those seeking to enter the facility – to be a citizen censor. And, as the Colorado Court of Appeals freely admitted, § 18-9-122(3) in essence prohibits *all* unconsented leafleting within 100 feet of a health-care facility. *See* Pet. App. at 56(a)-57(a).

Section 18-9-122(3)'s vagueness exacerbates its lack of narrow tailoring. For example, when does speech constitute "protest," "education," or "counseling"? And, short of an express "You may come talk to me," or a "Yes" to a request to approach, what constitutes "consent"? Not knowing how to answer these questions, the speaker's only recourse if he or she wants to be sure to avoid criminal sanctions is self-censorship.

The Colorado courts' and legislature's tone-deafness to First Amendment concerns was exemplified when the trial court characterized the speech restricted by § 18-9-122(3) – every day First Amendment activities such as leafleting – as "the offensive and disturbing conduct taking place outside health-care facilities." Pet. App. at 33a. Despite the trial judge's belief, the First Amendment does not allow states to treat non-threatening and non-harassing speech as "offensive and disturbing conduct" subject to criminal sanctions simply because the targeted listener does not want to hear the speech. The Colorado Supreme Court's decision upholding § 18-9-122(3) violates the First Amendment and must be reversed.

ARGUMENT

I. COLORADO REVISED STATUTE § 18-9-122(3) IS TARGETED AT SPEECH AND EXPRESSIVE ACTIVITY IN PUBLIC FORA.

Despite the Colorado Supreme Court's intimations otherwise, § 18-9-122(3) is aimed like a laser beam at speech and other expressive activity in public fora. Section 18-9-122(3) restricts 1) "passing a leaflet or handbill"; 2) "displaying a sign"; and 3) "engaging in oral protest, education, or counseling." This Court repeatedly has recognized that the First Amendment protects all these activities. *See, e.g., Schenck v. Pro-Choice Network, Inc.*, 519 U.S. 357, 377 (1997) (leafleting and commenting on matters of public concern); *United States v. Grace*, 461 U.S. 171, 176-77 (1983); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

That § 18-9-122(3) expressly prohibits "approaching" another person does not change this. This facile distinction, suggested by the Colorado Supreme Court, 973 P.2d at 1257, is too clever by half. Section 18-9-122(3) does not prohibit approaching *qua* approaching. Instead, § 18-9-122(3) prohibits approaching another person only "for the purpose of" engaging in the listed expressive activities. A person within 100 feet of a health-care facility who approaches within eight feet of another to, say, orally lobby that person violates § 18-9-122(3); a person who approaches that same other person for any reason other than engaging in the listed expressive activity does not violate § 18-9-122(3).

As the State and the trial court both conceded, the public streets and sidewalks to which § 18-9-122(3) applies are "quintessential" public fora. *See, e.g.*, Pet. App. at 32(a); JA at 277. This Court's precedent mandates these concessions. As

this Court stated in *Hague v. CIO*, 307 U.S. 496, 515 (1939) (plurality opinion):

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been part of the privileges, immunities, rights, and liberties of citizens.

Thus, "[o]ne who is rightfully on a street open to the public 'carries with him there as elsewhere his constitutional right to express his views in an orderly fashion.'" *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (citations omitted); *see also Schenck*, 519 U.S. at 377 ("speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum"). Section 18-9-122(3) unconstitutionally restricts the right to "express [one's] views in an orderly fashion" on public sidewalks near health-care facilities.

II. SECTION 18-9-122(3) OPERATES AS A PRIOR RESTRAINT ON SPEECH THAT GIVES CITIZEN CENSORS THE UNBRIDLED DISCRETION TO RESTRICT SPEECH ON PUBLIC SIDEWALKS.

Section 18-9-122(3), by empowering all persons within 100 feet of health-care facilities to refuse consent to speakers' attempts to communicate with them, operates as a prior restraint

on speech. For example, the right to even attempt to hand a person a leaflet depends on that person's consent; if the person does not consent, the leafleter must either halt his efforts or face criminal prosecution. And criminal prosecution lies not on any harm or potential harm the leaflet might cause (for example, the leaflet's threatening nature); it lies simply because the leafleter has dared to attempt to leaflet without obtaining consent. This is the hallmark of a classic prior restraint.

Section 18-19-122(3) throttles expressive activity before it occurs. The statute makes it a crime to "knowingly approach another person within eight feet of such person, unless such other person consents, *for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person* in the public way or sidewalk within a radius of one hundred feet from any entrance door to a health-care facility." Colo. Rev. Stat. § 18-19-122(3) (1998) (emphasis added). The Colorado legislature has placed the state's full police power behind the individual, unchecked decisions of private citizen censors. The mere fact that these censors are private citizens does not place this statute beyond constitutional scrutiny. As this Court has held, "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299 (1966); *cf. Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997).

Section 18-19-122(3) does exactly what *Evans* forbids: it empowers private individuals, backed by the force of law, to censor protected expressive activity in a manner that would be forbidden to government officials. Rather than just being able to walk away from unwanted speech, these citizen censors have the authority to criminalize the mere attempt to engage in protected expressive activity within eight feet of them.

"While '[p]rior restraints are not unconstitutional *per se* . . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (omissions in original) (citation omitted). Prior restraints bear this heavy burden because of a "theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in original).

The prior restraint created by § 18-9-122(3) violates the First Amendment in three ways. First, § 18-9-122(3) vests unbridled discretion in the citizen censors it empowers. Second, § 18-9-122(3) does not limit the time in which citizen censors must act to deny consent. Finally, § 18-9-122(3) does not contain the procedural safeguards required for a licensing scheme.

A. Section 18-9-122(3) Vests Unbridled Discretion in Citizen Censors.

"[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide its licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). Section 18-9-122(3) provides no standards to guide the citizen censors' decisions.

As this Court has noted, unbridled discretion is dangerous because exercising this discretion can result in censorship. *FW/PBS, Inc.*, 493 U.S. at 225-26. And in the case of § 18-9-122(3), the censorship is likely to be content-based and viewpoint-based. The Colorado legislature tacitly acknowledged this likelihood when it stated that a person's "right to protest or counsel *against* certain *medical procedures* must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner. . . ." Colo. Rev. Stat. § 18-9-122(1) (1993) (emphasis added). Evidently, the Colorado legislature anticipated that the discretion it was granting to the citizen censors created by § 18-9-122(3) would be used to silence persons protesting *against certain medical procedures*. Such censorship is both content-based (speech concerning certain medical procedures) and viewpoint-based (speech against certain medical procedures).

Section 18-9-122(3) places the State's full police power behind the citizen censors' decisions and provides no guidelines by which to make those decisions. Consent to approach can be refused for any reason. Placing the power to criminalize speech in the hands of people who happen to be within 100 feet of a health-care facility creates a variation of the heckler's veto:

a heckler's license. In the past, this Court has refused to interpret a federal statute so narrowly that the construction would "confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech. . . ." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997) (citation omitted). If government cannot confer a heckler's veto on those objecting to indecent speech, certainly Colorado cannot confer a heckler's license on those objecting to normal conversation and expressive activity on a public sidewalk in front of a health-care facility.

B. Section 18-9-122(3) Imposes no Time Limit for Consenting.

Another evil a system of prior restraint must avoid is a lack of a limit on the "time within which the decision maker must issue the license." *FW/PBS, Inc.*, 493 U.S. at 226. Section 18-9-122(3) possesses this evil as well. The statute imposes no time limit on when a citizen censor must decide. Thus, protected expressive activity is prohibited indefinitely.

In *Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781 (1988), this Court stated that the delay caused by a licensing scheme regarding professional fundraisers "compel[led] the speaker's silence." *Riley*, 487 U.S. at 802. Under those circumstances, the "licensing provision [could not] stand." *Id.* The same is true of § 18-9-122(3). It cannot stand because it allows citizen censors to compel silence indefinitely.

C. Section 18-9-122(3) Lacks any Other Procedural Safeguards.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that a film licensing scheme was invalid because it did not contain adequate procedural safeguards. *Id.* at 60. The Court identified three necessary safeguards: first, the censor must prove that the expression is unprotected; second, before judicial review, restraint must be limited to maintaining the status quo; and third, any procedure must include a "prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* at 58-59.

Section 18-9-122(3) contains none of these procedural safeguards. To the contrary, the citizen censors bear no burden of showing that the speech they wish to prohibit is unprotected, and the deterrent effect of the licensing scheme is not minimized by prompt final judicial decision. The citizen censors possess unbridled discretion to censor protected expressive activity absent any time limit or procedural safeguard. Section 18-9-122(3) is thus an unconstitutional prior restraint on First Amendment protected activity.

III. SECTION 18-9-122(3) IS NOT NARROWLY TAILORED BECAUSE IT TARGETS AND ELIMINATES MUCH MORE THAN CONDUCT THAT IMPEDES ACCESS TO COLORADO HEALTH CARE FACILITIES.

Even if § 18-9-122(3) is not a prior restraint of speech, the statute still unconstitutionally restricts far more speech than is

necessary to serve Colorado's ostensible goal of ensuring access to health care facilities. Section 18-9-122(3) is not a narrowly tailored time, place, and manner restriction; rather, it is a blunderbuss restriction that effectively prevents both quiet communication at a normal conversational distance and leafleting, both "classic forms of speech that lie at the heart of the First Amendment." *Schenck v. Pro-Choice Network, Inc.*, 519 U.S. 357, 377 (1997). Nothing about these two constitutionally-protected activities poses an inherent threat to the government's goal of ensuring unimpeded access to Colorado medical facilities.

A generally applicable ordinance imposing time, place and manner restrictions passes scrutiny under the First Amendment only when it is "justified without reference to the content of the regulated speech, . . . [is] narrowly tailored to serve a significant government interest, and . . . leave[s] open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Narrow tailoring requires that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799. A law is narrowly tailored only "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citation omitted).

Even assuming the time, place, and manner standard is the proper standard to apply, § 18-9-122(3) fails that standard. Section 18-9-122(3) imposes criminal liability on anyone within 100 feet of the entrance door to a health-care facility who, without first obtaining permission to do so, approaches within

eight feet of *any* other person (not just those trying to enter the facility), to pass a leaflet to, display a sign to, or direct oral protest, counseling or education to that other person. Not only does § 18-9-122(3) eliminate *much more* than "the exact source of evil it seeks to remedy," the statute actually has very little to do with the exact source of evil the Colorado legislature targeted. Section 18-9-122(3) cannot even be called "loosely tailored." It is akin to performing surgery with a chainsaw.

A. Section 18-9-122(3) Effectively Eliminates, Within 100 Feet of Colorado Health-Care Facilities, All Leafleting, A First Amendment Activity Which In No Way Threatens Any Significant Government Interest.

The right to distribute leaflets and pamphlets promoting opinions on public issues occupies a cherished position in the history of First Amendment jurisprudence:

> The liberty of the press . . . necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated . . . Liberty of circulating is as essential to that freedom as liberty of publishing.

Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (citations omitted); *see also Schneider v. New Jersey,* 308 U.S. 147, 160

(1939). In both *Schneider* and *Lovell*, this Court struck down ordinances prohibiting the distribution of pamphlets and circulars without a license. In *Schneider*, this Court rejected the argument that those who wished to distribute handbills could do so in places other than streets and alleys. "Streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." 308 U.S. at 163.

In *International Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672 (1992), this Court struck down a ban on handbilling even though the ban applied in a nonpublic forum. Applying the reasonableness standard of review operative where speech restrictions occur in nonpublic fora, this Court held a ban on leafleting "unreasonable." "It is difficult to point to any problems intrinsic to the act of leafleting that would make it naturally incompatible with the purposes of [the nonpublic forum]." *Id.* at 690 (O'Connor, J., concurring).

In *Schenck v. Pro-Choice Network, Inc.*, 519 U.S. 357 (1997), this Court struck down the portion of an injunction that established floating buffer zones near certain abortion businesses, in part because the injunction prohibited peaceful leafleting. *Id.* at 361. The floating zones were imposed against anti-abortion activists who allegedly obstructed public passages, engaged in harassing conduct, and otherwise persistently disregarded New York criminal laws. *Id.* at 362-66.

The Court explained the operation of the floating zones in *Schenck* as follows: "The floating buffer zones prevent

Defendants -- except for two sidewalk counselors, while they are tolerated by the targeted individual – from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." *Id.* at 377. Observing that these floating buffer zones constituted a "broad prohibition, both because of the type of speech restricted and the nature of the location," the Court held the floating buffer zones unconstitutional. *Id.* at 377. The restrictions operated "in public areas" where speech "is at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Id.* (citation omitted).

The eight foot buffer zone imposed by § 18-9-122(3) effectively prevents leafleting and handbilling absent consent. The Colorado Court of Appeals admitted as much when it stated that "with reference to the fact that leafleting may not take place within 100 feet of the entrances to the medical clinic unless consent is given, we view the significant government interest here sufficient to warrant the requirements of the statute." Pet. App. 56a. Once the buffer is invoked, it would be nearly impossible to distribute any leaflet, short of tossing the leaflet to the intended recipient and hoping she catches it. Attempts to pass leaflets to two or more people walking together could be thwarted by one person's refusal to consent, even if the others with him might otherwise at least glance at the material. The First Amendment does not guarantee willing listeners but it does protect the opportunity to win their attention. *See Kovacs v. Cooper,* 336 U.S. 77, 87 (1948).

In this respect, § 18-9-122(3) is not narrowly tailored to further the government's interest in hindering access to health care or preventing threatening or harassing behavior toward incoming patients. Leafleting is not inherently harassing or threatening, and this Court already has rejected the notion that peaceful leafleting is necessarily obstructive. *United States v. Kokinda*, 497 U.S. 720, 734 (1990) ("One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand."). Moreover, § 18-9-122(3) "protects" not just people seeking to enter a health-care facility, but all people who happen to be 100 feet from the facility entrance. And, unlike the individuals subject to the injunction in *Schenck*, the leafleters, § 18-9-122(3) targets need not ever have engaged in threatening or harassing conduct in the course of their expressive activities. No legitimate government interest is furthered in so constraining the First Amendment rights of law-abiding citizens. If a ban on leafleting is unreasonable in a nonpublic forum such as an airport terminal, *see Lee*, 505 U.S. at 690, it is indefensible in a public forum such as the sidewalks outside health-care facilities.

B. Section 18-9-122(3) Suppresses Constitutionally Protected Speech That Poses No Threat to the Government's Interest in Assuring Free Access to Colorado Health Facilities.

Section 18-9-122(3) also is not narrowly tailored because it curtails the speech of all persons within 100 feet of any medical facility in the State of Colorado. It grants unfettered license to all passersby – not just people seeking to enter health care facilities – to censor others' speech for any reason. In

prohibiting demonstrators from approaching within eight feet of all other persons, it effectively eliminates much normal conversational speech and severely curtails protestors' rights to quietly pass on their message to others.

In *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994), this Court struck down a portion of an injunction remarkably similar to § 18-9-122(3). The injunction in *Madsen* ordered protesters to "refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." *Id* at 773. The *Madsen* provision, like the one here, allowed the prospective counselee to control the prospective counselor's opportunity to engage in protected expression. This Court held that the consent requirement alone invalidated the provision: "[I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id at* 774. Unless such a restriction is limited to speech that either is "independently proscribable," such as "'fighting words' or threats," "or is so infused with violence as to be indistinguishable from a threat of physical harm," such a "provision cannot stand." *Id.* In *Madsen*, the Court reaffirmed "'that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" *Id.* (citation omitted).

In *Houston v. Hill*, 482 U.S. 451 (1987), this Court invalidated a municipal ordinance which made it "unlawful for

any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making the arrest." *Id.* at 455. The majority held that the provision was overbroad. Noting that state law had preempted the provisions dealing with assaulting and striking, the Court found that "the enforceable portion of the ordinance deals not with core criminal conduct, but with speech." *Id.* at 460. The Court stated that the freedom "verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state" and found that the ordinance was "not narrowly tailored to prohibit only disorderly conduct or fighting words." *Id.* at 462-63. "[A]lthough we appreciate the difficulties of drafting precise laws, we have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *Id.* at 465. This Court concluded: "The Constitution does not allow such speech to be made a crime." *Id.* at 462.

In *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997), *on remand from Sabelko v. City of Phoenix*, 519 U.S. 1144 (1997) (mem.), the Court of Appeals for the Ninth Circuit struck down an ordinance that is similar to § 18-9-122(3). The ordinance in *Sabelko* imposed eight foot floating buffer zones around all those who were within 100 feet "of an exterior wall or entryway" of a "health-care facility." The buffer zones only became operative when "invoked." *Id.* In other words, within 100 feet of the facility, a speaker could approach within eight feet of another for purposes of handing a leaflet, engaging in oral advocacy, or displaying signs. The speaker was only

required to withdraw after the person so requested. Thus, under the ordinance, the speaker at least had the opportunity to win the person's attention. *See Kovacs v. Cooper,* 336 U.S. at 87.

After this Court remanded the case to the Ninth Circuit for reconsideration in light of *Schenck*, the Ninth Circuit held that the ordinance was not narrowly tailored. Applying *Schenck*, the Ninth Circuit determined:

> The Phoenix ordinance suffers the same defects as the injunction in Schenck. It contains a broad prohibition on speech with which it is difficult to comply without risking a violation of the ordinance. An individual within the access area to a clinic can invoke the eight-foot floating buffer zone, effectively preventing handbilling and normal conversation. Demonstrators who attempt communication with an individual must constantly monitor themselves to ensure that they don't encroach upon that individuals's or another individual's floating buffer zone. Further, the demonstrators are faced with the problem of determining which people within the access area have invoked the protection offered by the buffer zone.

Sabelko, 120 F.3d at 165.

Section 18-9-122(3) does not target precisely proscribable evils. The statute restricts all attempts to speak in a normal conversational tone with any person in those public places within the scope of the statute. The statute does not regulate only contact between speakers and patients or employees of medical facilities (though this still would be overbroad). Instead, anyone who is walking down a public street, within 100

feet of the entrance door to a medical facility, is given the power to restrict whether anyone else may speak, leaflet, or display signs.

Even worse, if a speaker seeks to approach two or more people to communicate with them, any one of them can thwart the attempt by withholding consent, even if his companions do consent. Arguably, a person would not violate § 18-9-122(3) if he approaches two or more people with the intent to communicate with only one of those people (who consents) and that person's companions do not consent. In reality, however, it is unlikely that a person seeking to communicate with one member of a group will not be seeking to communicate with the other members. Moreover, it will likely not be apparent that the speaker is seeking to communicate with only the consenting member. It very well may *appear* to a police officer enforcing the statute that the speaker is violating the statute, which could well lead to the officer arresting the speaker. The speaker may ultimately be found not guilty, but he will have been silenced. To avoid this situation, the safe course for the speaker when confronted with non-consent from other group members will be to avoid the approach altogether -- in other words, self-censorship. Thus, even when a person does not technically violate § 18-9-122(3) by approaching a consenting listener who is accompanied by non-consenting companions, § 18-9-122(3)'s practical effect will be to allow the non-consenting companions to prevent speech with the willing listener.

Like the injunction in *Madsen*, § 18-9-122(3) bars all approaches to patients who withhold consent. Also, as in *Madsen*, the statutory restriction is not limited to proscribable

speech. It restricts peaceful, nonthreatening leafleting, sign displays, and "oral protest," "education," and "counseling." That the buffer zone in this case is eight feet rather than 300 feet as in *Madsen* is immaterial. It is impossible to engage in the kind of quiet, personal counseling that Petitioners conduct from a distance of eight feet. At a distance of eight feet, Petitioners would likely have to shout to be heard above ambient street noise, thereby dramatically reducing, if not eliminating, the possibility that any incoming patient would consent to speak with them.

Section 18-9-122(3) encroaches even further upon protected First Amendment rights than did the ordinance invalidated in *Sabelko*. At least under the *Sabelko* ordinance, a speaker could approach an incoming patient and attempt to win her attention. No such attempt is permitted under § 18-9-122(3). Speakers are relegated to shouting at people from eight feet with only the patently absurd hope that incoming patients will invite someone shouting at them to draw nearer. As in *Sabelko*, demonstrators cannot be expected to precisely and instantaneously calculate an eight foot distance while moving. Further, the demonstrators are faced with the problem of determining whom within the access area has consented to speech and who has invoked the protection offered by the buffer. The statute does not define consent. Thus, the speaker is left to guess whether a silent nod suffices or whether there must be a clear verbal invitation to approach. Faced with the threat of criminal prosecution, speakers will not want to risk the wrong guess. In sum, if the ordinance in *Sabelko* could not survive reconsideration in light of *Schenck*, § 18-9-122(3) should certainly fail.

Section 18-9-122(3) is also substantially broader than the buffer zone struck down in *Schenck*, which was limited to persons "entering or leaving the clinics," 519 U.S. at 377, as well as the "no approach" zone struck down in *Madsen,* which was limited to "person[s] seeking services of the clinic," or patients. 512 U.S. 773. By contrast, § 18-9-122(3) applies to all persons within one hundred feet of a healthcare facility. Although the Colorado Supreme Court suggested that the statute was designed to protect the privacy rights of citizens "entering and leaving Colorado health care facilities," 973 P.2d at 1247-48, the statute contains no such limitation. Section 18-9-122(3) sweeps much wider and includes passersby who are not even traveling to the facility.

In addition, as was true in *Houston v. Hill,* § 18-9-122(3) effectively provides the police with unfettered discretion to arrest demonstrators because they engaged in speech that offended others. In the volatile context of demonstrations outside abortion clinics (or some other health care facilities, for example, a teaching and research hospital which animal rights activists are picketing because of experiments on animals taking place in the hospital), it is all too easy for demonstrators' speech to annoy or offend others. If a demonstrator misjudges eight feet, or a person's consent, § 18-9-122(3) provides police the facile opportunity to arrest demonstrators on manufactured charges fueled primarily by the offense and annoyance of others.

In the Colorado Supreme Court's view, *Schenck* was not dispositive because "*Schenck* involved a judicially created preliminary injunction drawn solely for the parties before the

Court" while "section 18-9-122(3) is not the creature of our judiciary, but, instead, is a statute crafted by a coordinate branch of government, and is a rule of general application representing the public policy choices of the General Assembly." 973 P.2d at 1254. It is true that this Court has applied different standards of review to injunctions and ordinances. *See Madsen*, 512 U.S. at 765; *but see id.* at 778-779 (Stevens, J., concurring in part and dissenting in part) (explaining why statutes, which are aimed at all citizens, should be subjected to more stringent scrutiny then injunctions, which are aimed only at lawbreakers to remedy and prevent violations of law). But it is absurd to suggest that *Madsen* permits the legislative branch to squash more First Amendment rights than the judicial branch. Whatever the distinction between the two standards of review, nothing in this Court's jurisprudence supports the Colorado court's view that proven lawbreakers have more constitutional rights than law-abiding citizens.

Finally, the chilling effect § 18-9-122(3) had on Petitioners' exercise of their First Amendment rights demonstrates the statute's overbreadth. Before the statute was enacted, Petitioners spoke against human abortion on public sidewalks and ways within 100 feet of the entrances to abortion facilities.[2] They advised women near abortion businesses about alternatives to abortion. They spoke without fear of censorship[3]

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[2]Pet. App. 4, 112-14, 148-49, 151-53.

[3]Pet. App. 4, 112-14, 148-49, 151-53.

or prosecution.[4] When § 18-9-122(3) became law, Petitioners stopped or altered their activities out of fear of prosecution. Simpson completely discontinued his expressive activities within 100 feet of abortion facility entrances.[5] Hill and Himmelmann changed their activities to avoid prosecution.[6] These changes have made their efforts more risky, more difficult, and less effective. They have found it impossible, at times, to remain on the sidewalk, keep at least eight feet away from others and continue to speak, display signs, or otherwise protest or counsel.[7]

The floating buffer zones at issue here are not narrowly tailored to achieve Colorado's interest in "assuring a citizen's access to medical counseling and treatment at Colorado health care facilities." *See* 973 P.2d at 1250. The buffer zones do not "aim specifically at evils within the allowable areas of State control but, on the contrary, sweep[] within [their] ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940). Such a broad ban as the one created by § 18-9-122(3) is not "*necessary* for the maintenance of peace and tranquility on the public sidewalks surrounding the building." *United States v. Grace*, 461 U.S. 171, 182 (1983) (emphasis added).

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[4]Pet. App. 4, 112-14, 148-49, 151-53.

[5]Pet. App. 153.

[6]Pet. App. 114, 149.

[7]Pet. App. 113, 149, 153.

IV. SECTION 18-9-122(3) IS UNCONSTITUTIONALLY VAGUE.

Section 18-9-122(3)'s vagueness exacerbates its over-breadth. This Court repeatedly has struck down laws that are phrased "in terms so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *See also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). While all laws must be reasonably clear, laws that regulate or restrict free speech, must satisfy "a more stringent vagueness test." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982). *See also Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) ("[t]he general test of vagueness applies with particular force in review of laws dealing with speech"). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley*, 487 U.S. at 801 (internal quotation marks and citations omitted).

On numerous occasions, this Court has delineated the dangers presented by vague laws. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). In *Grayned*, this Court cautioned that "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone. . . than if the boundaries of the forbidden areas were clearly marked." *Id.* at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). The Court held that "because we assume that man is free to steer between lawful and unlawful conduct, we insist

that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108. *See also Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (holding vagrancy ordinance unconstitutionally vague because it failed to give fair notice that contemplated conduct was prohibited, and because it encouraged "arbitrary and erratic arrests and convictions."). Where legislation fails to provide such minimal guidelines, it creates "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

In *Schenck*, 519 U.S. 357 (1997), this Court struck down a portion of an injunction imposing a floating buffer zone, in part, because its terms created substantial ambiguity and lack of certainty about how to comply with the injunction and thus created a substantial risk that more speech would be burdened than the injunction prohibited. 519 U.S. at 359.

Section 18-9-122(3) is vague in its use of the terms "knowingly approach," "consent," "protest," "counseling," and "education." That these words are used commonly in the English language does not assist a person of ordinary intelligence in discerning what the statute permits and what it prohibits. For example, the statutory term "knowingly approach" presents a would-be speaker with his or her first dilemma. While the state court construction of "knowingly approach" avoids inadvertent violations caused by a third party, it does not answer the question of what constitutes the *actus reus* requirement, "approaches." The Colorado Supreme Court held that a speaker could stand still and engage in a full range

of expressive activities. The question remains, however, whether extending a hand to a passerby to give him a leaflet is "approaching"? What if a speaker bends or leans toward a person while keeping his feet in place?

Section 18-9-122(3) also prohibits approaching within eight feet of a person for the purpose of protest, education, and counseling. The words "education," and "counseling" alone include expression of almost every stripe imaginable. Any expression that conveys information unknown to the recipient is arguably "education." How can a speaker be expected to know in advance what information a person possesses? Suppose, for example, that a speaker approaches within eight feet of a person to inform him that the facility performs laboratory experiments on animals. If the person is not aware of that fact, will the speaker have engaged in "education" under the statute? If the person was previously aware of the health facility's experiments, is the statute not violated? The term "counseling" is similarly vague. Is "please, don't experiment on animals" counseling or a simple plea? Or, is it a protest?

Finally, it is unclear what constitutes "consent." Does "consent" mean "to be of the same mind or opinion,"American Heritage Dictionary 312 (2d College ed. 1991), or does "consent" mean a passive acquiescence? *Id.* There are an infinite number of ambiguous utterances and non-verbal signs. And what of those who do not respond to a request for permission to approach? Is nonresponsiveness the legal equivalent of permission or denial? What if a leafleter approaches two people walking together and receives consent from one but not the other? Whose response controls the

leafleter's right to approach? It can even be unclear whether a person's nod is addressed to the speaker or to the person's companion. Given the minimal movement arguably necessary to "approach," coupled with the ambiguity surrounding what constitutes "consent," the only way to safely comply with the statute is to stand perfectly still.

Section 18-9-122(3) creates substantial uncertainty about how to comply with its terms. All the uncertainty surrounding the meaning of the statute's terms will certainly deter speakers from approaching because the price of misunderstanding is criminal prosecution. Section 18-9-122(3) subjects speakers to criminal prosecution for doing nothing more than misunderstanding a verbal or nonverbal indication. Section 18-9-122(3) also provides the police with discretion to make arbitrary arrests. If the police do not like a speaker's message or his tie for that matter, they can trump up charges that a speaker approached a bystander for the purpose of leafleting without that person's "consent." Similarly, § 18-9-122(3)'s vagueness creates the potential for convictions that are inconsistent throughout the state. The statute fails to give "fair warning as to what is prohibited" and does not "'define[] boundaries sufficiently distinct' for citizens, policemen, juries, and appellate judges." *Grayned*, 408 U.S. at 114.

Section 18-9-122(3) imposes vague prohibitions, forcing Petitioners to risk charges or censor their speech to avoid them. Section 18-9-122(3) leaves enforcement to the unfettered discretion of private citizens by defining criminal speech according to the *ad hoc* judgments of private citizens. Free speech must not be left to the good will of others; otherwise,

"the free dissemination of ideas [will be] the loser." *Smith v. California*, 361 U.S. 147, 149 (1959).

CONCLUSION

Section 18-9-122(3) is a vague, overbroad prior restraint on every day expressive activity on public sidewalks that certainly "abridges the freedom of speech." This Court should reverse the Colorado Supreme Court's judgment in this case.

Respectfully submitted,

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